effective, OVS operator control over most or all programming on the system — in other words, in a cable system.

1. OVS carriage obligations must enable independent programmers to use capacity readily on the OVS.

The Commission must shape specific antidiscriminatory OVS rules to make it possible for independent programmers to compete without depending on the operator's discretion for carriage. The first such rule, clearly, must protect the statutory requirement that 2/3 of system capacity be actually available to independent programmers.

The 2/3 capacity requirement should apply not only to the OVS system as a whole, but also separately to both analog and digital portions, since (at least for the near term) most programmers will not be able to use all modes of transmission.[14] For the same reason, it would be inconsistent with the Act to allocate all analog capacity to one programmer.[15] An OVS must provide nondiscriminatory access, not only to capacity in general, but to specified types of capacity. All programmers, including the OVS operator and its affiliates, must have an equal opportunity to use each type of capacity.

For the same reasons, if the Commission allows an OVS operator to impose limits on the amount of capacity that one independent programmer may occupy,[16] such a limit must not be

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[14] Cf. NPRM ¶ 17.

[15] NPRM, ¶ 21.

[16] NPRM, ¶ 20.

less than the same 1/3 capacity the OVS operator may use, as long as capacity is available. Comparable amounts of channel capacity will be necessary to allow such an independent programmer to compete with the OVS operator itself Thus, a maximum capacity restriction below 1/3 of the total OVS capacity should be permitted only insofar as excess demand for the 2/3 set-aside capacity requires fair allocation among the competing programmers.

Similarly, channel positioning rules must also be nondiscriminatory.[17] Rules allowing the OVS operator any significant control over channel arrangements would make it too easy for the OVS operator to gain a competitive advantage over disfavored independent programmers — and become too much like a cable operator. The operator could manipulate menus and channel assignments so that viewers "surfing" the channel sequence, or (where applicable) pursuing certain sorts of programming via menu systems, are steered preferentially to the OVS operator's channels.

2. OVS rules must make it easy for programmers to identify and show discrimination by requiring uniform, public carriage rates.

The NPRM is simply wrong in suggesting that the OVS rules should allow for some "discrimination."[18] Such a result would be contrary to the language of the Act (quoted at NPRM ¶ 9). It

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[17] NPRM, ¶ 22.

[18] NPRM ¶ 32.

would permit an OVS operator easily to exclude all truly independent programming by manipulating rates and terms. A common carriage analogy (or related analogies in antitrust or for wholesale transactions under Federal Power Act, Natural Gas Act, or possibly resale arrangements for telephone service) is far more apt than leased access.

The Act's requirement that an OVS operator not "unjustly or unreasonably" discriminate is a direct lift from the common carrier model. As such, it must be read to allow only reasonable differences among reasonable classes of programmers, such as special rates for PEG programmers, or volume discounts based on lower equipment costs for transmission or switching of multiple channels to a subscriber in package form. But such classifications must be open, objective and verifiable, and not based on content. And they may be established only to the extent that the rules encourage truly open access by independent programmers of all sizes and budgets.

New section 653(b) requires the operator to establish reasonable and nondiscriminatory rates.[19] This is not the language of individualized case-by-case contracts. Rather, it implies a common rate structure that must be applied without discrimination to all programmers. But if programmers are to be able to identify discrimination when it occurs, and demonstrate it to gain the necessary relief, the rate structure must also be publicly available in advance.

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[19] NPRM, ¶ 5.

Tariffing (otherwise referred to as rate filing) is the primary means recognized by the Supreme Court through which this problem has been addressed. For example, in Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,[20] the U.S. Supreme Court rejected an Interstate Commerce Commission (ICC) policy that permitted a carrier in bankruptcy to collect negotiated rates lower than its tariff rates, on the grounds that such a policy worked to violate the statutory requirements of nondiscrimination and reasonable rates contained in the Interstate Commerce Act. The Court stated that published tariffs that are charged (with limited exceptions) universally have been considered "essential to preventing price discrimination and stabilizing rates."[21] The Court further endorsed tariffs as an essential component of nondiscriminatory rate-setting for telecommunications providers in MCI Telecommunications v. American Tel. & Tel.:

> The tariff-filing requirement is. . . the heart of the common-carrier section of the Communications Act. In the context of the Interstate Commerce Act, which served as its model, ... this Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . "[22]

We recognize, of course, that Section 653 provides that OVS operators will not be subject to all of the requirements of Title II. At the same time, however, OVS operators are subject to the same requirement of reasonable and non-discriminatory

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[20] 497 U.S. 116 (1990).

[21] Id. at 126.

[22] 114 S.Ct. 2223, 2231 (1994).

rates as common carriers, and the courts have repeatedly concluded that publicly-posted, uniform rates are the only reliable means of enforcing such a requirement.

We suggest the following way to resolve this conundrum in the Act. OVS operators may be permitted to set their rates without requiring prior Commission approval in the fashion of a tariff, but the OVS operator must make all carriage contracts publicly available.[23] Moreover, the OVS operator must justify any differences in the rates charged for carriage — including the rates charged to its own affiliates or itself[24] — by reference to verifiable and objective factors, such as genuine cost-justified differences (such as volume discounts), and the non-profit nature of the programmer (as with the special status of PEG programmers under the Act). The OVS operator should not, however, be permitted to draw distinctions based on programming content.

For the same reason, the Commission's rules should ensure that all OVS programming contracts contain as a matter of course a "most favored nation" clause, providing that the programmer will automatically receive the benefit of any better deal the OVS operator gives to another similarly-situated programmer. It will still be necessary to publicize contracts so that differences can be discovered, but such clauses should make it a routine

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[23] NPRM, ¶ 34.

[24] See Amendment of Part 21 of the Commission's Rules With Respect to the 150.8-162 Mc/s Band, Docket No. 16778, Report and Order, 12 F.C.C. 2d 841, 849-50, 852 (1968), recon. denied, 14 F.C.C. 2d 269 (1968), aff'd, Radio Relay v. FCC, 409 F.2d 322, 327 (2d Cir. 1969).

matter to adjust any such differences found. If any carriage contract does not include a most favored nation clause, an explanation should be required from the OVS operator and the Commission should investigate.[25]

Making all contracts public will be one powerful way to ensure real, not merely sham, availability. As long as this requirement applies to everyone (including the OVS operator's own affiliates), no operator or programmer can claim to suffer a competitive disadvantage from such public availability. Any claims that secret "proprietary" contract terms are somehow necessary should be rejected. After all, the LEC can always choose the cable franchise option if it wishes. To the extent that cable operators may be permitted to make secret contracts with programmers, this is a privilege the OVS operator gives up in exchange for the advantages of OVS.

3. The Commission must use either a yardstick or a cost-based approach to determine the reasonableness of rates.

Even eliminating discrimination, however, does not resolve the equally critical problem of determining whether a carriage rate is "reasonable," and effectively auditing the rates an OVS operator would charge to its own affiliates. The Commission should require any programming affiliate of the OVS operator to file standalone financial statements from which the affiliate's rate of return and cash flow can be determined. Repeated losses

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[25] We endorse the comments of the City of Dallas, et al., on this point.

or inadequate rates of return by the OVS operator's programming affiliate would indicate that the OVS operator's carriage rates represent artificially high transfer prices designed to discourage independent, disfavored programmers. Such a reporting requirement might reduce somewhat the need to regulate the OVS operator's carriage rates directly in the traditional sense, by reviewing its ratebase and costs.

But financial disclosures alone would still be insufficient to define the reasonableness of the rates, in the absence of any cost-based rule. If the Commission does not apply a rate-of-return criterion, there must be some "yardstick" test to ensure that there are actually independent programmers on the OVS system, as a check on the reasonableness of rates. We propose that rates will be presumed unreasonable unless (1) at least 1/3 of system capacity is occupied by independent programmers not of the OVS operator's choosing; and (2) at least four such programmers are on the system. This "reality check" would serve as an independent means to ensure that undetected tricks with the financial reports could not be used to exclude independent programmers. These two criteria — multiple entities, together with a percentage of independent channel capacity — are necessary to guard against an OVS operator's using sub rosa "sweetheart" deals to evade the affiliation rules: it would be more difficult to make and conceal such deals with many programmers than with a few.

The only alternative to the stringent yardstick presumption approach we have outlined would be a utility-like, cost-based pricing mechanism to determine whether carriage rates are reasonable and nondiscriminatory as Section 653 requires. And the Act does not preclude the Commission from using such a mechanism. While the Act says that OVS is not subject to Title II obligations,[26] this does not imply that OVS operators are immune from whatever regulatory mechanisms the Commission finds necessary to determine the reasonableness of carriage rates. Otherwise, OVS operators would be free to violate the reasonable rate requirements of Section 653 that form the heart of the entire OVS model.[27]

4. The Commission's rules must prevent OVS operator-programmer relationships outside the carrier-user relationship.

If an OVS is to be a truly open system, OVS rates and terms must encourage both large and small programmers (the well-heeled and those of more limited means) to use the OVS. The Commission's OVS rules must make it as straightforward and easy

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[26] See NPRM, ¶ 30.

[27] The approach outlined above, in contrast, applies only those aspects of a tariff-like process that are specifically required or necessarily implied by the language of the Act: just and reasonable rates (47 U.S.C. § 201(b)), nondiscrimination (47 U.S.C. § 202(a)). It avoids the use of other Title II requirements, such as a duty to expand capacity to serve all comers (§ 201(a)); establishment of rates in absolute terms (§ 201(b)); approval of tariffs prior to service (§ 203); hearings on proposed rates (§ 204); prior approval of construction by the Commission (§ 214); and accounting requirements (§ 220).

as possible for all programmers to obtain OVS capacity. There must be as bright a line as possible to discourage improper behind-the-scenes relationships between the OVS operator and favored non-affiliated programmers. Absent such a bright line, it will be impossible to monitor and enforce whether ostensibly independent programmers have relationships with the OVS operator outside the carriage arrangement.

In the past, the Commission has found only one mechanism able to deal with such artifices. The "carrier-user" restriction in the Commission's former telco-cable cross-ownership rules was designed to deal with many of the same concerns.[28]

We therefore recommend that the Commission's OVS rules should provide that, for a programmer to qualify toward an OVS operator's 2/3 set-aside obligation, the OVS operator's relationship with that programmer should be restricted to a "carrier-user" relationship. The OVS operator should, however, be allowed to perform billing and collection services for such programmers on a non-discriminatory basis.

5. Rules for allocation of OVS capacity must protect independent programming competition.

The NPRM suggests that the OVS operator should be allowed to manage channel allocation, either in general, or when demand exceeds capacity.[29] Clearly, any such control by the OVS operator would be tantamount to the editorial control exercised

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[28] See former 47 C.F.R. § 63.54, Note 1(a).

[29] NPRM ¶¶ 11, 24.

by cable operators, since choosing the program packager or managing channel allocations amounts to choosing the programming indirectly. If the initial demand exceeds system capacity, a proportional allocation, in which all comers will receive some capacity in proportion to the total capacity available, appears to be most equitable and to promise the widest diversity of program offerings.[30]

The question of reallocating capacity to accommodate later applicants, however, is at least equally important. The Commission's discussion of an enrollment period and isolated later updates only every few years (NPRM ¶¶ 14, 25-26) seems to presume a one-time allocation that is then frozen in stone for a period of years. That is unacceptable and inconsistent with the purpose of OVS.

We believe that, until or unless any OVS operator's 2/3 set-aside obligation is completely filled, any programmer willing to meet the "open" contract must be allowed on the system within 30 to 60 days, and the OVS operator is obliged to reduce the number of channels under its control accordingly. This sort of responsibility is the essence of being an open system operator rather than a cable operator. It is essential to remember that if the need to remain perpetually "open" to new comers is a burden to the OVS operator (see NPRM, ¶ 25), the LEC need not put up with that burden: it can always be a cable operator.

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[30] Cf. NPRM, ¶ 24 & n.36 (proportional allotment method based on amount of requested capacity during an enrollment period).

Once the OVS capacity is entirely filled, the best solution to allow new programmers to enter may be rules that ensure an open market in subleasing capacity and free trading of access rights (as against the operator-centric approach of NPRM ¶ 15). Unless the Commission can develop other means to ensure that at least some capacity remains available at all times, it will be essential that OVS channels be assignable, so that programmers can resell their capacity freely, without interference from the OVS operator. In this way a new programmer willing to pay the market price may always in principle be able obtain capacity from existing users. While this rule, without more, may not ensure that affordable capacity is always available for programmers of modest means, it should help to prevent OVS capacity from being locked up once for all. Once again, it is essential to the OVS model that the OVS operator does not have the right to exercise editorial control and hence to monopolize speech on all channels. A LEC that wishes to exert such total editorial control may always choose the cable option.

The NPRM also erroneously seems to assume that switched digital systems will have unlimited capacity.[31] This is not the case. Any switched system has limits on its throughput capacity, switches, input ports, and the like. The public switched telephone network, for example, is a switched network, but it clearly has capacity limits (cf. NXX and other area code issues).

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[31] If the NPRM's assumption were correct, the Commission could simply require that such an OVS carrier provide capacity to all comers, and there would be no problem.

Thus, there is no basis for relieving switched systems from the set-aside obligations that Section 653 requires.

6. OVS program marketing and selection rules must protect access by independent programmers.

The NPRM suggests that the OVS operator may be allowed to market other programmers' channels.[32] This, however, would be indistinguishable from what a cable operator does. For example, when a cable operator carries HBO or TNT, the cable operator is selecting and offering to its subscribers a package of programming put together by other -- often unaffiliated -- parties. HBO or Turner have chosen the particular programs that run on the HBO and TNT channel feeds, and the cable operator is merely transmitting the programming chosen by its program providers. Thus, if the OVS operator were allowed to market other programmers' products along with its own, this would make it a cable operator.

In addition, it is hard to imagine how an independent programmer could compete with the OVS operator if the OVS operator could bundle the independent's programming in with its own products, but not vice versa. In effect, the OVS operator would be able to offer all the channels on its system to subscribers -- not just 1/3 -- while the independent could only offer its own channels. Such an arrangement would doom intra-system competition, not promote it.

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[32] NPRM ¶¶ 10, 27.

Similarly, the NPRM suggests that the OVS operator may choose what programming is carried on shared channels, or select another entity to do so.[33] Either notion would result in impermissible editorial control by the OVS operator and potential discrimination against independent programmers. If the OVS operator could determine which channels could be shared, it would gain considerable control over all programmers' packaging decisions. To allow the OVS operator to select another entity to do so would merely permit an OVS operator to do indirectly, through an agent, what it should not be allowed to do directly. A simpler solution would be to require the OVS operator to carry on only one physical channel any program feed requested by two or more OVS programmers, and to make that channel accessible to all of those programmers' subscribers. If the OVS operator itself wants to carry the shared channel, it must negotiate with the program providers in exactly the same way as do the OVS program packagers.[34]

It must be kept in mind that precluding OVS operators from exercising any influence over program selection on the two-thirds of system capacity set aside for others on OVS is consistent with the First Amendment. After all, any would-be OVS operator that wishes to select all the programming itself always has the option under the Act of being a cable operator instead if it wishes.

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[33] NPRM, ¶ 37.

[34] See NPRM, ¶ 41 (each video provider must deal with program vendors independently).

7. OVS programmer application and usage rules must protect independent programming competition.

Financial Conditions. The Commission should resist any suggestion that potential programmers demonstrate financial resources or meet other artificial hurdles, which would simply deter competition. Rather, the Commission should specify a maximum financial commitment for programmers that would not form a barrier to entry for competing independent programmers — for example, one month's carriage fees in advance as a deposit, to be returned on termination.

Parity With Affiliates. It is difficult to know what to make of the NPRM's question whether an OVS operator should be allowed to charge independent programmers higher rates than it charges its own affiliates.[35] We think it should be obvious that the OVS operator and its affiliates can get no better deal than other programmers. If nondiscrimination means anything, it must mean this.

Minimum Channel Requirements. If the OVS operator could set minimum requirements — for example, refuse to make available less than five channels to a programmer — it would be simple for the OVS operator to eliminate small or niche-market programmers from competition for its capacity. Thus, the OVS operator should be

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[35] NPRM, ¶ 31.

required to make single channels and partial (part-time) channels available, to accommodate those of limited means.[36]

C. An OVS Operator That Violates the Commission's OVS Rules Should Be Required to Obtain a Cable Franchise.

If an OVS operator is found to be in violation of the OVS rules, it should be decertified and required to obtain cable franchises for the relevant areas. This remedy would ensure that the operator could stay in business as a video competitor, but would deprive it of the special OVS privileges it had abused. In cases where the violation does not fall clearly within the Commission's rules, the Commission may wish to provide the OVS operator with notice and sixty days' opportunity to cure before decertification.

III. OPEN VIDEO SYSTEMS MUST MEET LOCAL COMMUNITY NEEDS AND INTERESTS.

The Act requires the Commission to make rules that will impose on an OVS obligations no greater or less than those contained in sections 611, 614, and 615 of the Cable Act and section 325 of the Communications Act (PEG access, must-carry and retransmission consent). The following comments address this

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[36] The Commission recently recognized that cable operators must make part-time arrangements available to leased access programmers. See Public Notice, Commission Adopts Order And Further Notice of Proposed Rulemaking Regarding Rules for Cable Television Leased Commercial Access, at 2 (March 21, 1996). Obviously, OVS operators should be subject to no lesser standard than cable operators.

statutory requirement that the Commission's rules require PEG commitments equal to those of a cable operator.[37]

A. The Public Interest Necessarily Has Local As Well As Nationwide Components.

When the Commission attempts to identify the public interests relevant to OVS PEG requirements, the Commission cannot limit its investigation to national or federal interests. The Commission must also consider, and affirmatively take into account, the interests of the various state and local jurisdictions. This imperative is reflected in the legislative history of the Act. House Report No. 104-204 states:

> In considering how to implement the capacity, services, facilities, and equipment requirements for PEG use . . . the Committee intends that the Commission give substantial weight to the input of local governments, which have long-standing and extensive experience in establishing and implementing such requirements.[38]

Congress recognized that local governments have unique expertise in the ascertainment of public needs and interests in connection with PEG requirements, and determined that such expertise should be brought to bear on the determination of the PEG obligations of OVS within the local communities.

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[37] We agree with the comments of the Alliance for Community Media et al., and the City of Dallas et al., on this issue.

[38] H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 105 (1996) ("House Report").

B. PEG Obligations for Open Video Systems Must be Established Consistent With Local Needs and Interests.

New Section 653(c)(1)(B) of the Communications Act provides that Section 611 of the Cable Act, "Cable Channels for Public, Educational, or Governmental Use," shall apply to OVS operators in accordance with regulations to be prescribed by the Commission.[39] Those regulations must ensure that OVS operators fulfill "obligations that are no greater or lesser" than the obligations contained in Section 611.[40] The legislative history relating to Section 653(c)(1)(B) makes clear that the regulations to be promulgated by the Commission to implement that section must be crafted so as to impose PEG access requirements on OVS that are "equivalent" to the obligations agreed to by cable operators.[41]

Section 611 of the Cable Act, of course, authorizes each local franchising authority to establish requirements in a franchise for the designation of channel capacity for PEG use, including institutional networks. To establish PEG requirements, each local franchising authority typically conducts an ascertainment process to determine its individual PEG access needs and interests. Once determined, these needs and interests are translated into specific requirements for facilities, equipment, and channel capacity and are incorporated into a

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[39] 1996 Act, Section 302 (adding 47 U.S.C. § 653(c)(1)(B)).

[40] Id. at § 653(c)(2)(A).

[41] House Report at 105.

negotiated franchise.[42] Such requirements may include, for example, dedicated channel capacity; upstream feeds to allow PEG programming to reach the cable headend; PEG studio and production facilities and equipment; institutional networks and related equipment.

The resulting PEG obligations are thus tailored to each individual community's needs and interests as a product of either negotiations or a formal renewal process, equitable to both the community and to the cable operator. Both the statute and sound policy require that the PEG obligations of OVS operators must likewise be tailored to each local community's needs and interests as determined by each affected local franchising authority.

C. An OVS Operator Should Be Subject To A "Match or Negotiate" Requirement: It May Choose Either To Match Each Incumbent Cable Operator's PEG Obligations, Or To Negotiate Agreements Acceptable to the Affected Communities.

OVS operators should be obligated to fulfill their statutory PEG obligations through a "match or negotiate" system. Under our proposal, an OVS operator must, as a pre-condition to certification, either: (a) agree to match the PEG obligations of each incumbent cable operator in each affected franchise area, and any future changes therein; or (b) reach agreement on an alternative arrangement with each affected franchising authority in whose jurisdiction the OVS will be. In either case, the OVS

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[42] See 47 U.S.C. §§ 531(b), 546(c)(1)(D).

operator's certification to the Commission should include a statement of the PEG requirements to be imposed by each affected community with which the OVS operator will comply. See 47 U.S.C. §§ 531, 544 and 546. Moreover, the statement of PEG requirements should bear the endorsement of each affected franchising authority.

1. Under the "match" option, the OVS operator must provide exactly what the cable operator provides.

Under the first (or "match") option, the OVS operator would simply agree to match the PEG requirements contained in the cable franchise of the incumbent cable operator in each cable franchise area covered by the OVS system. If an OVS operator chooses this option, it must also certify in its OVS application that it will match any future changes in a cable operator's PEG obligations, as may well occur when the cable operator's franchise is renewed or periodically renegotiated or modified.

Each community's PEG needs and interests are likely to change over time. Indeed, the franchise renewal process specifically contemplates that each franchising authority will ascertain each individual community's cable-related needs and interests. See 47 U.S.C. § 546. Based on the results of that ascertainment, the PEG obligations delineated in a renewal franchise may — and typically do — differ from those in the prior franchise.

This means that after an OVS system matches existing PEG obligations, if the cable operator's PEG obligations increase

under a subsequently granted renewal franchise, the OVS operator's PEG obligations must likewise increase. To conclude otherwise — that is, to refrain from requiring an OVS operator to match a cable operator's new PEG obligations — would result in the OVS operator having "lesser" PEG obligations than those of the cable operator. That would be directly contrary to the clear language of the Act. It also would do violence to the renewal provisions of the Cable Act by interfering with the community's ability to upgrade its PEG requirements as contemplated by 47 U.S.C. § 546, and would tend to produce a competitive imbalance between the cable and OVS operators. Hence, where new PEG obligations are imposed upon the incumbent cable operator, the OVS operator must be required to match those obligations as well.[43]

Logic dictates that this rationale must extend to the provision of PEG facilities as well as capacity. For example, if, based on local community needs, a franchise requires the

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[43] We suspect that LECs will argue that it would be unfair to require an OVS operator to upgrade its PEG obligations based on a renewal franchise with a cable operator that the OVS had no role in negotiating. This argument is misguided for two reasons. First, the statute requires that an OVS operator's PEG obligations be no less than those of the cable operator. But if an OVS operator is not required to upgrade its PEG obligations along with the cable operator, then it would have impermissibly "lesser" PEG obligations. Second, the Commission must remember that the LEC always has the option of being a cable operator rather than an OVS operator, thereby enabling it, like the cable operator, to negotiate PEG obligations. The advantage of OVS is that the OVS operator can, if it chooses, avoid negotiations and merely match the existing cable operator's obligations. An OVS operator should not, however, be allowed to have it both ways: the certainty and simplicity of matching while, at the same time, complaining of its inability to negotiate terms.

cable operator to provide certain PEG facilities and equipment, any OVS operator coming into that community must provide equivalent PEG facilities and equipment. Similarly, if local community needs and interests dictate that the incumbent cable operator must provide an institutional network, then any OVS operator coming into that community must likewise provide an institutional network. See 47 U.S.C. § 531. This result is entirely consistent with both the letter of new Section 653(c)(2)(A) and with the legislative history.[44] Moreover, it promotes nondiscriminatory treatment of similar providers of similar services.

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[44] In discussing the regulations to be promulgated by the Commission to implement Section 653(c)(1)(B) of the Act, the House Report states that the regulations "shall impose obligations on video platforms that are equivalent to the obligations imposed on cable operators." House Report at 105. The House Report goes on to discuss the deference that the Commission must give to local governments when the Commission endeavors to determine how to implement the "capacity, services, facilities and equipment requirements for PEG use. . ." set forth in the Act. House Report at 105 (emphasis added). This language makes clear that when drafting Section 653(c)(1)(B), Congress intended OVS operators to provide PEG facilities and equipment (including institutional networks referred to in Section 611), in addition to PEG capacity, that will be equivalent to what is required of the cable operator. Congress clearly understood that a requirement of PEG capacity without a concomitant requirement for facilities for PEG program production and transmission can render the former requirement meaningless. Channel capacity implies the means to program it.

2. Under the "Negotiate" Option, OVS Operators May Negotiate Alternative Arrangements with Communities, Which Could Result in Greater PEG Benefits for the Community and, at the Same Time, Greater Cost Efficiency for the OVS Operator.

The matching obligation of an OVS operator with respect to PEG must be cumulative with the PEG obligations of the cable operator. The PEG obligations for OVS should not, as the NPRM seems at times to suggest, be used as an excuse for halving the cable operator's PEG obligations.[45] The Act contemplates that the PEG obligations of OVS operators will be "equivalent to the obligations imposed on cable operators."[46] If the OVS operator and the cable operator were simply to share the incumbent cable operator's existing PEG obligations, the OVS operator would, by definition, be providing less PEG support than the cable operator was providing, and the cable operator would be providing less PEG support than required by its franchise. The Act cannot be construed to sanction such a "dumbing down" of PEG access.[47]

At the same time, we recognize that in some cases, it may be more practical and cost-effective to allow an incumbent cable operator and an OVS operator to have different (but equivalent), rather than identical, PEG obligations. We therefore propose

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[45] See, e.g., NPRM, ¶ 57.

[46] House Report at 105.

[47] An additional occupant of the public rights-of-way will necessarily mean more burdens and more private profits, and in any normal business arrangement will mean more rents, than the initial occupant alone. See Section V infra.

that OVS operators be given a second (or "negotiate") option in addition to the "match" option.

Under the "negotiate" option, the franchising authority and the OVS operator may negotiate PEG obligations that are not identical to those of the incumbent cable operator, but that provide an equivalent benefit to the community, provided that the franchising authority agrees to such an arrangement prior to the OVS option's certification application. For example, if the cable operator were already providing an institutional network, the OVS operator, rather than providing a second such network, might agree to provide terminal equipment for use with the institutional network, at a comparable cost. Thus, the burdens on the two operators would be the same, but the community would benefit from intelligent planning of the combined compensation.

A variation of the "negotiate" option would be to allow the franchising authority, the incumbent cable operator, and the OVS operator to negotiate a "win-win-win" solution. The two operators and the franchising authority could enter into a trilateral agreement that would result in greater PEG support than the incumbent cable operator is providing while, at the same time, costing the OVS operator and the cable operator less than simple duplicate "matching" of the cable operator's existing PEG obligations.

Thus, for example, rather than matching the cable operator by building a PEG studio duplicative of the one built by the cable operator, the OVS provider might instead agree to provide

an equivalent amount of equipment or support to the existing PEG studio, thereby strengthening the PEG programming capabilities of the existing studio facilities. Under this approach, the total PEG obligations of the two operators would be greater than the cable operator's alone, but perhaps less than a simple doubling of these obligations. And the relative PEG obligations of each operator could be proportional to the number of subscribers served by each, or perhaps to their respective revenues.

Conceivably, such an agreement could allow for the automatic adjustment of the companies' relative obligations thereunder based on changes in the number of each operator's subscribers or level of revenues. It is conceivable that under such a scheme, with the franchising authority's consent, the cost of the cable operator's PEG obligations could be decreased somewhat, particularly if the cable operator loses subscribers or revenue to the OVS competitor, while the OVS operator would not have to take on all of the burden of "matching" the cable operator's original PEG obligations.[48]

3. In the exceedingly rare case where an OVS system is located in an area where no cable operator is franchised to serve, the OVS operator must negotiate its PEG obligations with the local government.

An OVS operator's "match or negotiate" obligation should apply to any area that is within the franchise area of a cable

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[48] One possible result could be the development and expansion of independent, regional nonprofit PEG access centers, such as those already in operation in Grand Rapids, St. Louis, and elsewhere, offering economies of scale.

operator, regardless whether the cable operator has actually extended service to the area. The NPRM asks what an OVS operator's PEG obligations should be in areas where there is no incumbent cable operator.[49] Properly construed, such cases should be exceedingly rare. The number of places in the nation where no cable operator is franchised to serve (as opposed to areas where the cable operator is franchised but has not extended its system) is exceedingly small. And it seems unlikely that OVS operators would be attracted to such areas, which by definition would have been unattractive to cable operators, including LECs that otherwise could have qualified under an exception to the former cross-ownership rule.

In the exceptionally few cases where an OVS operator seeks certification in an area that no cable operator is authorized to serve, the OVS operator should be required to undertake negotiations with the local government. Of course, these negotiations may be much narrower in scope than negotiations for a cable franchise. But they will be no less important.

Negotiations between the OVS operator and the local government in such cases will be imperative because, due to the absence of any prior cable franchising process, such negotiations would be the only practical mechanism by which the community can both impart to the OVS operator the community's PEG access needs and interests, and bind the OVS operator to an obligation to fulfill those needs and interests. As suggested above, the

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[49] NPRM, ¶ 57.